Supreme Court, U.S.
FILED
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No. 99-1519

IN THE

Supreme Court of the United States

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

JOE BAILEY, *et al.*,
Respondents.

-and-

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

EDDIE S. CALDWELL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM FLANIGAN
Counsel of Record
LANE O. AUSTIN
SANDERS, AUSTIN, SWOPE
& FLANIGAN
Attorneys for Respondents
320 Courthouse Road
Princeton, WV 24740
(304) 425-8125

158933

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES SUPREME COURT HAS ALREADY ANSWERED THE QUESTION PRESENTED IN THE RAILROAD'S PETITION

The correct formulation of the question presented in the Petition is whether independently-granted rights under the West Virginia Human Rights Act are preempted by an arbitrator's decision that did not and could not address the workers' age discrimination claim.

The answer to this question is not uncertain under current law. The United States Supreme Court in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 257 (1994) recognized that "[the Railway Labor Act's] mechanism for resolving minor disputes DOES NOT preempt causes of action to enforce rights that are independent of the [Collective Bargaining Agreement]" (emphasis added):

> [N]o proposed interpretation of the Railway Labor Act demonstrates a clear and manifest congressional purpose to create a regime that broadly preempts substantial protections extended by the States, independent of any negotiated labor agreement.

Id. at 256-57.

Hawaiian Airlines involved a Railway Labor Act employee whose termination was upheld by an arbitrator under the existing Collective Bargaining Agreement. The employee then brought a State Court action under Hawaii's Whistle-Blower Act, claiming he had been wrongfully

terminated for refusing to falsify safety reports. *Hawaiian Airlines* reaffirmed that causes of action that find their source in State law and arise independently of the Collective Bargaining Agreement [CBA] are not preempted by the Railway Labor Act. *Id.* at 258.

As the Court explained in applying § 301 LMRA analysis to the Railway Labor Act, the contract claim and the state law claim may involve many, if not all, the same facts, yet not result in preemption:

> The fact that a dispute resolution arises pursuant to a collective bargaining agreement does not preempt the enforcement of state law claims that are based on the same set of facts. Independently-granted statutory rights do not depend upon the bargaining agreement for the rights being enforced. So long as the rights are created by law, not by contract, they are not preempted simply because they relate to or concern matters that likewise may be covered by the contract. They, therefore, are not in conflict with enunciated federal law and are not preempted.

Id., *see also Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 408-09 (1988).

The proper analysis, the Court emphasized, is not whether there are a common set of facts, but whether there is a distinctive and separate protection given to the worker under the substantive law of the State. *Id.* at 408, 409. The "bare fact the [Collective Bargaining Agreement] will be consulted in the course of the State law litigation does not require the claim to be extinguished." *See Livadas v.*

Bradshaw, 512 U.S. 107, 125 (1994). Nor does it matter that the arbitral process was invoked before the State Court action. A potential remedy under the CBA "does not deprive an employee of independent remedies available under state law." *Hawaiian Airlines*, 512 U.S. at 262.

In the present case, the factual inquiry simply is whether Norfolk & Western possessed a discriminatory motive in its treatment of its older workers and utilized whatever means it could, including conditions and privileges of employment, to effectuate this discriminatory motive? *Bailey v. Norfolk & Western Railway Co.*, Case No. 26004, December 15, 1999 (pg. 9) __ W. Va. __ (1999). The employees' State civil rights case, just as in *Hawaiian Airlines*, turned on this purely factual inquiry. *Hawaiian Airlines*, 512 U.S. at 261-62.

II.

ARBITRATOR RECOGNIZED HE HAD NO AUTHORITY TO RULE ON AGE DISCRIMINATION CLAIMS

The arbitrator's decision here did not and could not deal with the men's claims that they were victims of intentional age discrimination. The arbitrator correctly recognized he was "only authorized to interpret the agreements. . . ." In an unprecedented addendum to his decision, however, the arbitrator noted that "[i]f [he] had the power of equity, . . . [his decision upholding the employer's practice against the men's grievance] would not be the same." [Public Law Board No. 4721].

The railroad continues to mischaracterize the arbitrator's decision. Nowhere does the arbitrator use the word REQUIRED with respect to the workers' placement on the

seniority roster[1]. The arbitrator simply ruled that he could not invalidate the railroad's placement of the older men on the conductor roster under the contract.[2] He acknowledged he had no power or authority to go outside the agreements, but noted he would rule in the men's favor if he had the "power of equity."

The arbitrator's decision, in any event, was not challenged in the men's civil rights case. The men's substantive rights under West Virginia law did not depend on what the arbitrator decided. It depended on the railroad's motivation in devising a broad-based strategy designed to rid itself of older workers. *Skaggs v. Elk Run Coal Co.*, 198

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1. The arbitrator in Public Law Board No. 4721 addressed two issues: (1) whether the men had to accept promotion; and (2) whether their placement on the work roster was consistent with the CBA. The arbitrator used the word "require" with respect to issue number (1) — whether the men had to accept promotion. This was never an issue because the Presidential Emergency Board had acceded to the railroad's request to force the men to accept conductor rights.

2. The railroad reached back nearly four decades — before the enactment of the Civil Rights Acts — for contractual support for its placement decisions. The unitary system of placement on the conductor roster, then, applied to every worker on the railroad. By the time the railroad exercised promotion power after the 1991 Presidential Emergency Board, a separate system of promotion was in place for younger workers which gave these workers credit for brakeman service on the conductor roster. Rather than propose the same promotion credit for older workers, the railroad sent side letter agreements to the Pocahontas Division United Transportation Union's [UTU] General Chairman stating these older men would be placed on the bottom. When the UTU refused to consent, the railroad implemented the two-tracked system of promotion which penalized older workers for years of service.

W. Va. 51, 479 S.E.2d 561 (1996). The two-tracked seniority system — one that gave younger workers credit for their service as brakemen and the other stripping older workers of credit for their service as brakemen — simply was a tool in the railroad's broader strategy to rid itself of older workers. *See Bailey v. Norfolk & Western Railway Co.*, Case No. 26004, pg. 9, December 15, 1999, __ W. Va. __ (1999); *See also Bailey v. Norfolk & Western Railway Co.*, 842 F. Supp. 218 (S.D. W. Va. 1994). The employer's motivation was a purely factual determination made independent of the CBA under State substantive law. *Hawaiian Airlines*, 512 U.S. at 261-62.

The arbitrator has a very restrictive role under the Railway Labor Act. That role is limited to applying the CBA to the facts presented. The arbitrator has no authority to interpret the Railway Labor Act or to apply other statutory protections covering the same conduct, such as civil rights statutes. [*See NRAB, 3rd Div., Award No: 19790 (1979)*, (this Board lacks jurisdiction to enforce rights created by State or Federal statutes and is limited to questions arising out of interpretations and applications of the Railway Labor Agreement); *Northwest Airlines/Airlines Pilots' Association, International System Board of Adjustment*, decision of 06/28/97, pg. 13 (both the traditional role of the arbitrator and admonitions of the Court require the Board to refrain from attempting to construe any of the provisions of the Railway Labor Act). *United Airlines, Inc.*, 48 LA 727, 733 (1967) (BNA) (the jurisdiction of the system board does not extend to interpreting or applying the Civil Rights Acts)]. An arbitrator's decision that a particular practice is consistent with the collective bargaining agreement does not foreclose an independent action under State law: "Substantive protections provided by State law, independent of whatever

labor agreements might govern, are not preempted under the [Railway Labor Act]." *Hawaiian Airlines*, 512 U.S. at 257.

Nor does an adverse arbitral decision override an employee's civil rights claims. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), a victim of civil rights' violation had pursued a claim through the arbitration process and obtained an adverse ruling. The employer argued that his claim under Title VII of the Civil Rights Act of 1964, therefore, was foreclosed. The United States Supreme Court rejected this reasoning:

> Title VII strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred conform no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

415 U.S. 36, 51-52.

The Court made it plain that "mere resort to the arbitral forum to enforce contractual rights constitutes no waiver . . ." of independent protections provided by law. *Id.* at 53.

Here, there was no attempt to litigate the employees' civil rights claims before the arbitrator. He possessed no power or authority to rule on these claims — a limitation he expressly recognized in his written decision. *See Lingle*, 486 U.S. at 414; *Alexander*, 415 U.S. at 51, 52. The men properly proceeded on their civil rights claims in State Court. These

claims did not turn on the CBA. They turned on the employer's discriminatory motive as judged by the substantive law of the State of West Virginia. *Skaggs*, *supra*. Purely factual questions about "an employer's conduct or motives do not require a Court to interpret [the CBA]". *Hawaiian Airlines*, 512 U.S. at 262.

The United States District Court for the Southern District of West Virginia, in its decision to remand this case to State Court for trial, recognized these employees' rights were not dependent on the CBA:

> If [the] plaintiffs' assertions in their Complaint are well-founded, this right [under the Human Rights Act] exists separate and apart from any Collective Bargaining Agreement between the defendant and the plaintiffs' union.

Bailey v. Norfolk & Western Railway Co., 842 F. Supp. 218, 224 (S.D. W. Va. 1994).

These employees did not surrender the civil rights granted to them under the West Virginia Human Rights Act when they assumed employment for the railroad. The principle is well-established that Congress, in devising laws to govern the workplace, never intended to give the substantive provisions of private labor agreements the force of federal law, "ousting any inconsistent State regulation. . . ." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211-12 (1985). Nor do parties to a Collective Bargaining Agreement, even if the Agreement addressed the issue at hand, have the authority to "contract for what is illegal under State law." *Id.* at 211-12. The parties cannot use the Collective Bargaining Agreement to discriminate, even by

mutual consent. Neither can the railroad unilaterally use that device as a method and means of accomplishing a broader scheme motivated by animus toward older workers. The mere fact that the discrimination claims revolve around the railroad's use of the CBA does not change that analysis. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. at 413 n.12. Nor are the independent State claims foreclosed because the men were first required to seek relief through the arbitral process. *Lingle*, 415 U.S. at 414.

The railroad imputes far more power to the arbitrator than precedent or common sense allow. An arbitrator has no authority to nullify independent substantive rights granted to workers under State law. *Hawaiian Airlines*, *supra*. Nor can he shelter illegal practices from the reach of federal or state law by finding them justified under a Collective Bargaining Agreement. *Id.*, *Gardner-Denver Co.*, 415 U.S. at 48-49. Even if the arbitrator exceeds the limits of his authority and decides the civil rights claim, the aggrieved party may still submit the issue to the appropriate forum. *Id.*; *see also Lingle*, 486 U.S. at 414. The railroad's formulation of an arbitrator's role, if upheld, would mean the most blatant violations of substantive rights would have no remedy. An employee would be forced to arbitrate a claim before an entity with no power to decide his claim. Having followed the futile but required path, the courthouse then would be closed to him because of the preemptive effect of the labor agreement: a perfect world for those bent on discriminatory practices.

III.

STATE COURT DECISION IN ACCORD WITH RULINGS OF THE SUPREME COURT

The West Virginia Supreme Court of Appeals' decision in *Bailey, et al. v. Norfolk & Western Railway* does not conflict with relevant decisions of this Court.[3] The decision is entirely consistent with the reasoning of the United States Supreme Court in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 and other cases that have recognized the Railway Labor Act does not preempt a cause of action that arises under the substantive law of a State. *See, e.g., Atchison, TSR Company v. Buell*, 480 U.S. 557 (1987); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981); *Steele v. Louisville National R. Co.*, 323 U.S. 192 (1944); *Colorado Anti-Discrimination Commission v. Connecticut Airlines, Inc.*, 372 U.S. 714 (1938); *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 258 (1931).

The West Virginia Human Rights Act [W. Va. Code § 5-11-1, *et seq.*], far from conflicting with federal objectives, advances national civil rights policies. West Virginia's role in civil rights enforcement generally and in age discrimination enforcement specifically is expressly authorized by the Civil Rights Act of 1964 [42 U.S.C. § 2000(e)-7] and the Age Discrimination in Employment Act of 1967 [29 U.S.C. § 633]. Congress, in these enactments, explicitly encouraged continued state enforcement of their

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3. Rule 10 of the Rules of the Supreme Court of the United States provides that the Court's discretion to grant a *Writ of Certiorari* will be limited, among other circumstances, to those in which a State Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court."

own anti-discrimination laws so long as the state statutes did not legitimize an action unlawful under the federal counterpart. West Virginia's Human Rights Act [W. Va. Code § 5-11-1] tracks the parallel federal statutes in its definition of who is protected against age discrimination, W. Va. Code § 5-11-3(k), 29 U.S.C. § 631(a); what constitutes discriminatory practices, W. Va. Code § 5-11-9, 29 U.S.C. § 623; defining what employers are subject to the Act, W. Va. Code § 5-11-3(d), 29 U.S.C. § 630(b); and in creating and conferring private enforcement suits by aggrieved parties. 29 U.S.C. § 626(c).

Congress has made it plain that the States' historical and lawful role in enforcing anti-discrimination policies against employers operating within their borders is preserved under enunciated federal civil rights policy [42 U.S.C. § 2000(e)-7; 29 U.S.C. § 633] and it has not exempted the railroads or other Railway Labor Act employers from the regulatory effects of that policy. *See, e.g., Colorado Anti-Discrimination Co. v. Connecticut Airlines, Inc.*, 372 U.S. 714.

IV.

THE EMPLOYEES' SUBSTANTIVE STATE RIGHTS WERE DECIDED ON FACTUAL GROUNDS, INDEPENDENT OF THE CBA

The claims here were not limited to the railroad's conduct with respect to the two-tracked system of deciding conductor seniority.

The West Virginia Supreme Court described the central theme of the plaintiffs' disparate treatment claims:

> The plaintiffs do not directly attack the agreements or allege a violation thereof, but instead allege that the railroad discriminated against them in a more general effort to remove them from it workforce through any means available to it, including discriminatory application of the Collective Bargaining Agreements, intimidation, and hostile comments directed toward the older workers and based upon the age of those workers.

Bailey, et al v. Norfolk & Western Railway Co., Case No. 26004, December 15, 1999 (pg. 20a Petitioner's Appendix).

Disparate treatment cases invariably turn upon this single issue: The state of mind of the employer and whether, in making the decision, the employer was motivated by an animus toward older workers. *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986). The reason an employer may "have it in" for older workers are numbered and varied. The employer may believe they are lazy, less productive, less controllable than younger workers. The employer may believe they have acquired through years of service and seniority advantages in their employment in terms of their wages, benefits or the cost of maintaining them on the payroll. The employer may be involved in reorganizing work rules and creating more demanding physical tasks and associate younger workers as being better able to accomplish those tasks. The employer may view older workers as "high cost" employees, meaning they are more susceptible to injury, more costly in terms of

wages and benefit packages, or be less productive than younger workers. The employer simply may harbor unjustified and baseless stereotypical notions about older workers or be convinced, albeit wrongly, that they are slower, less productive, less flexible and more resistant to change at the workplace. The burden of the plaintiff is not to articulate or to uncover the precise reason an employer has it "in for" older workers; rather, his burden simply is to show that older workers are being discriminated against intentionally because of their age.

This was a case tried under "mixed-motive" principles. As the West Virginia Supreme Court of Appeals explained, "an employer may indeed have a legitimate basis for its employment decision and that legitimate basis may have played a role in the ultimate decision." *Skaggs v. Elk Run Coal Co.*, 198 W. Va. at 75, 479 S.E.2d at 585. In a mixed-motive cause of action, the plaintiffs may succeed if they can prove the decisions were motivated by discriminatory animus toward older workers. The burden of persuasion then shifts to the employer to show that the result "would have occurred even in the absence of an unlawful motive." *Id.* This type of factual inquiry does not depend on the terms of the CBA. *Hawaiian Airlines*, 512 U.S. at 262.

The factual inquiry as to the railroad's motivation was tried under well-established principles of West Virginia law:

> Because discrimination is essentially an element of mind, there will probably be very little direct proof available. DIRECT PROOF, HOWEVER, IS NOT REQUIRED. What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the

> plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criteria. This evidence could, for example, be in the form of an admission by the employer, a case of unequal or disparate treatment between members of a protected class and others, by the elimination of the apparent legitimate reason for the decision, or statistically [that] show . . . members of the protected class received substantially worse treatment than others.

Conaway, 178 W. Va. 164, 170-71, 358 S.E.2d 423, 429-30 (1986) (emphasis added).

The plaintiffs succeeded in their proof by evidence entirely independent of the arbitrator's decision and the CBA. The plaintiffs showed they were the targets of demeaning, age-based comments by supervisors with responsibility for implementing the railroad's labor policy. They showed the railroad falsified information contained in Court filings to justify the promotion practices.[4] The evidence showed that, after the arbitrator's decision, the railroad promoted younger

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4. The railroad removed this case to federal district court and sought its dismissal on preemption grounds. The district court rejected the railroad's request in a published decision, holding the claims of the men, if proved, "exists separate and apart from any Collective Bargaining Agreement. . . ." *Bailey v. Norfolk & Western Railway Co.*, 842 F. Supp. 218, 224. In its filings, the railroad produced an Affidavit stating all promotions were done in accord with the existing labor agreements. The railroad had to concede at trial this statement was not true. [Tr. pgs. 399,400,403].

workers ahead of older workers in a fashion that even it later conceded was violative of the older men's rights.[5]

The evidence further showed the railroad's actions did not match its words. In its dealings with the Presidential Emergency Board, the carriers, including this defendant, represented that the power to force-promote these older men to the conductor position was necessary to deal with a chronic shortage. It wanted to open up a pool of qualified and experienced workers to assume these positions. Yet, once the railroad obtained the discretionary power to force-promote these men, it immediately relegated them to the bottom of the work roster at a time when it was giving credit to younger workers for their years of service to the railroad. Within twelve days of acquiring the power, the railroad announced it would give younger workers "run-around rights" versus these older men even when the younger

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5. Over the course of two years, 25 younger workers who took the conductor exam after the plaintiffs were forced to take conductor rights. In deciding where these 25 younger workers were to go on the seniority roster, the company allowed these younger workers to use their hire date on the railroad to run around the older men by comparing their hire date to the older men's conductor pass date. The older men were given an arbitrary conductor pass date, not reflective of the date they passed the exam, and the younger men were given a seniority placement that fully took into account their experience on the railroad. This was a plain violation of the older workers' rights, which the railroad had to concede at Trial [Tr. pgs. 399,400,403]. This overtly discriminatory placement persisted for nearly two years. The railroad filed a false sworn declaration in federal court to support its wrongful practice [Tr. pg. 453]. The placement was only changed during this litigation after the United States District Court for the Southern District of West Virginia refused to dismiss this case and remanded it for Trial in the Circuit Court of McDowell County.

workers had less job and conductor seniority — a practice it would have to admit was unlawful at Trial. It also followed-up this announcement ten days later with a separation program directed toward this same group — supposedly a desirable, experienced pool of workers. This is hardly consistent with the railroad's stated objectives in pursuing the promotion power.

Another contradiction related to its activities on the hiring front. At the same time the railroad was targeting these older workers for elimination, it was engaged in a rather vigorous hiring program. Nearly 1,700 new workers had been hired for positions on the railroad over the past several years at the same time the railroad had been representing that it had too many surplus workers and had successfully eliminated 1,800 senior workers' jobs. These new hires were overwhelmingly young in age. A very revealing pattern emerged: The railroad was targeting its older, experienced workers for elimination while hiring younger, inexperienced workers.

"The fact-finder's disbelief of the reasons put forward by the defendant (particularly if this belief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination." *Barefoot v. Sundale Nursing Home*, 457 S.E.2d 152, 164 n.20 (1995). There were many statements and positions taken by the railroad that the jury disbelieved in this case.

The railroad's representatives testified that the older workers were the more desirable, more experienced and more knowledgeable. These representatives attempted to leave the impression that it had desired some other outcome than

placing these men at the bottom of the conductor roster [Tr. pg. 684].

The jury disbelieved these statements with good reason: The railroad admitted that it immediately sent "side letters" to all Divisions placing these older men at the bottom of the work roster after it acquired the Presidential Emergency Board authority. No attempt was made to assure the older men's placement in accord with the same policy it was following with younger employees.[6] The railroad well knew that younger hirees would be placed on the work roster based on their trainmen's seniority. It understood that, by forcing these older men on the bottom of the roster, they would be behind these younger men even though they had superior skills, experience and seniority in the essential requirements of the job. This provided the railroad with the leverage it needed to achieve its broader purpose — forcing the older men out.

It wasted no time in using the leverage. Within days, the railroad sought to buy-out these supposedly desirable workers' jobs. It made the announcement of this separation package less than two weeks after deciding to exercise the power to force-promote these older men and announcing they would be placed on the bottom of the work roster.

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6. The Pocahontas Division's UTU General Chairman refused to sign the side letter agreement put to it by the railroad. The proposed side letter agreement sanctioned the railroad's plan to strip the older workers of their brakeman seniority, while still promoting younger workers with credit for brakeman service. The railroad went forward with its two-tracked promotion plan, acknowledging in its internal memorandum that the power the railroad was given by the PEB did not specify how the men were to be placed.

The jury was justified in believing that these decisions were connected: The railroad was using the power it had acquired from the Presidential Emergency Board to implement its broader discriminatory plan. It was targeting older workers for elimination and using their placement on the seniority roster as a further weapon to make the work place inhospitable to older workers. The temporal sequence between the railroad's announcement that these men would be stripped of their trainmen's seniority and placed on the bottom of the conductor roster less than two weeks before its separation proposal created an inference of a causal connection. *Cf. Holland v. Jefferson National Life Insurance Co.*, 883 F.2d 1307, 1314-15 (7th Cir. 1989).

The railroad, moreover, had to admit during testimony it regarded these workers as "high cost" [Tr. pg. 684]. It also expressed the belief that it was better for the railroad if these men left [Tr. pgs. 357-59]. The railroad also compiled injury data to document the greater susceptibility of older workers to work place injury [Tr. pg. 303]. These admissions belie the railroad's professed admiration for these older workers' skills and was developed entirely independent of the CBA to show discriminatory motive.

The railroad further attempted to persuade the jury it had no idea workers with 20-25 years of service were older in chronological age than the preferred class of new hirees. This was untrue. Its own buy-out proposals identified benefits that could only be of interest to chronologically-older workers and was expressly targeted at its longest serving employees. Moreover, its own counsel admitted in closing arguments the railroad traditionally hired young — by then, hardly a stunning admission in light of the plaintiffs' statistical evidence showing 13 of every 14 new hires were

under forty. Its Labor Director finally acknowledged senior workers in service means older workers in age generally on the railroad [Tr. pg. 381].

The railroad's practices penalized years of service, which is directly contrary to what seniority systems are supposed to do. As the United States Supreme Court explained in *California Brewers Association v. Bryant*, 444 U.S. 598, 606-07 (1980), a seniority system that "allots to employees ever-improving employment rights and benefits as their relative length of permanent employment service increases" is at the heart of what a legal and lawful seniority system is designed to accomplish. The railroad's actions with respect to these older workers turned this notion on its head. Workers who had 30 years of experience performing the essential requirements of the job were placed behind workers who were not even born in some instances when these men began their railroad service. Under applicable State substantive law, the jury was entitled to use this evidence in weighing the employer's true motivation. *Skaggs*, *supra*.

V.

THIS EMPLOYER IMPLEMENTED A FEDERAL MANDATE IN AN UNLAWFUL MANNER

The United States Supreme Court has recognized that a lawful mandate may be executed in a manner and means that violates workers' protection against age discrimination. In *Transworld Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), the Federal Aviation Administration established a legal mandate barring 60-year-olds from serving as pilots. 14 C.F.R. § 121-283(c). To effectuate this federally-mandated policy of forced retirement at age 60 for pilots,

the airline, which was a Railway Labor Act employer, devised a transfer policy that operated differently for younger workers and older workers. The policy allowed pilots to bump less senior workers in other cockpit positions, such as flight engineers, when they could not continue to perform their duties as pilots for medical reasons or other disqualifying considerations. However, the policy would not allow pilots to bump "less senior flight engineers" when the reason they were leaving pilot service was because of their disqualification under the Federal Aviation Administration rule regarding pilot retirement at age 60. The United States Supreme Court invalidated these differing "bumping rules" as violative of the workers' rights under the Age Discrimination in Employment Act.

The message of *Transworld Airlines* applies equally to the railroad in this circumstance. The Presidential Emergency Board established that brakemen must accept promotion to conductors if offered by the railroad. This promotion was not challengeable. The railroad, in implementing the federal mandate, put in place a two-track system that gave greater benefits in privilege and placement to younger workers and stripped older workers of the same privileges and benefits. In short, the railroad took this lawful authority and implemented it in a way designed to achieve a broader discriminatory purpose — to rid itself of older workers.

The employees did not challenge the right of the railroad to promote them to conductor in the State lawsuit. That issue has been resolved by the Presidential Emergency Board and the men had to accept promotion or face termination. The Presidential Emergency Board, however, did not prescribe the method and means by which these promotions were to be effectuated. Nor did it make the promotions mandatory.

It left it to the railroad to determine whether it would exercise this power and, if so, left it to the railroad to devise the method and means by which promotion was to be effectuated.

The railroad created two classes of railroad workers who would be force-promoted to the rank of conductor — older workers with service dates earlier than November 1, 1985 and younger workers with service dates after November 1, 1985. The railroad applied discriminatory work rules in its placement of these various groups on the conductor seniority roster — which was to be the work roster once down-sizing was completed.[7]

The younger workers who were hired as brakemen and then force-promoted to the conductor job category were placed on the roster by use of their brakemen or trainmen seniority. Younger worker's seniority date for his conductor position had nothing to do with when he acquired his conductor rights. It had to do with when he first became employed in the brakeman craft. A younger worker who passed his conductor exam on 05/01/90 was allowed to go ahead of a worker who passed his conductor exam two years earlier, but who had less brakeman or trainman seniority [Tr. pgs. 167-71].

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7. The Crew Consist Agreements in force at this time anticipated all brakemen jobs on through-freight would be eliminated within five years. The brakemen responsibilities were transferred to the conductor, which previously had been more of a paperwork job. Ninety percent (90%) of the duties of the reconstituted conductor position were formerly brakemen responsibilities. This made the conductor list the principal work roster for trainmen.

The older brakemen who were forced to take their conductor rights were denied the opportunity or right to use their trainmen seniority. Unlike the railroad's younger workers, the older brakemen were placed on the seniority roster in the conductor craft based on their pass date of the examination and were not allowed to use their far-longer brakemen or trainmen seniority to be placed in relative standing to other force-promotees. A very perverse situation developed. Men with 25 years and sometimes 30 years of service performing the essential requirements of the job were placed behind men with 2, 3 and 4 years of experience. Many of the affected workers were on the railroad when the younger hirees were in diapers; yet these new men were now placed ahead of the older workers on what was destined to become the only work roster available on the railroad [Tr. pgs. 109-10].

The railroad even went beyond the indignity of placing these older men at the bottom of the work roster. It moved them lower down with each new hiree who acquired conductor rights. It continued to place younger workers who later acquired their conductor rights ahead of the older men by allowing the younger workers to compare their earlier brakeman date to the older workers' conductor date. If conductor dates were the basis of comparison, the older workers would be ahead of the new hires. The railroad chose to use the younger workers' hire date as brakemen and compared it to the older workers' conductor date. Even the railroad had to concede at Trial this "run around" practice violated the older workers' rights.

VI.

WEST VIRGINIA SUPREME COURT OF APPEALS DECISION DOES NOT CONFLICT WITH ANOTHER FEDERAL APPEALS COURT RULING

The decision of the West Virginia Supreme Court of Appeals with respect to the railroad's preemption defense is entirely in accord with the decisions of the United States Supreme Court on the same issue. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. at 246.

The West Virginia Supreme Court of Appeals' decision also is not in conflict with the United States Court of Appeals for the Tenth Circuit's decision in *Hiatt v. Union Pacific Railroad*, 65 F.3d 838 (10th Cir. 1995). The West Virginia Supreme Court, in its written opinion, dealt with whether *Hiatt v. Union Pacific Railroad*, 65 F.3d 838 (10th Cir. 1995) was applicable to the West Virginia Human Rights claims being made by these railroaders. The Court noted that, in *Hiatt*, promoted men were not treated differently under the seniority system than other newly-promoted conductors. In the case *sub-judice*, the railroad applied two different promotion plans to conductors. One of the promotion plans benefited younger workers by allowing them to retain their brakemen seniority when they were forced to work in the conductor craft. The other system, for older workers, removed their brakeman seniority when forced to go on the conductor work roster. The differing work rules produced a reversal from what should occur in a *bona fide* seniority system. *California Brewers' Association, supra.*

Additionally, this case involves a broader inquiry into the employer's discriminatory motivation in its treatment of older workers than simply the different promotion criteria:

> The plaintiffs do not directly attack the agreements or allege a violation thereof, but instead allege that the railroad discriminated against them in a more general effort to remove them from its workforce through any means available to it, including discriminatory application of the Collective Bargaining Agreements, intimidation, and hostile comments directed toward the older workers and based upon the age of those workers.

Bailey, supra.

Finally, *Hiatt* presented a claim in which the older workers sought preferential treatment or relief from heavier work loads brought about by the changes in the workplace. The workers here sought placement on the work roster with the same credit for years of service being awarded to young workers.

CONCLUSION

For all the foregoing reasons, respondents respectfully request that this Honorable Court deny this Petition.

Respectfully submitted,

WILLIAM FLANIGAN
Counsel of Record
LANE O. AUSTIN
SANDERS, AUSTIN, SWOPE
& FLANIGAN
Attorneys for Respondents
320 Courthouse Road
Princeton, WV 24740
(304) 425-8125